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JAMES R. BROWNING

No. 98

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNION PACIFIC RAILROAD COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, WESTERN DIVISION

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The findings of fact (R. 196–205), opinion (R. 205–219) and conclusions of law (R. 219–222) of the district court are reported at 173 F. Supp. 397.

JURISDICTION

The orders of the district court, granting the Government's motion for summary judgment (R. 223) and granting an injunction (R. 224), were entered on April 3, 1959. Notice of appeal was filed in the district court on April 10, 1959 (R. 231–233). Probable jurisdiction was noted on October 12, 1959 (361 U.S. 807). The jurisdiction of this Court is invoked under 49 U.S.C. 45.

QUESTIONS PRESENTED

1. Whether the intentional delaying by a carrier of a shipment in order to afford the shipper additional time to find a buyer constitutes the furnishing of privileges or facilities not authorized by the tariff, the transporting of property at less than the filed rate, or the giving of a concession to the advantage of a shipper, in violation of the Interstate Commerce Act or the Elkins Act.

2. Whether an injunction under § 3 of the Elkins Act (49 U.S.C. 43) in an action brought by the United States, at the request of the Interstate Commerce Commission, ordering a carrier to cease offering a delayed delivery service not specified in its filed tariff unless and until a new tariff specifying such service has been filed with the Commission and become effective, invades the primary jurisdiction of the Commission.

STATUTES INVOLVED

The pertinent parts of Section 6(1) and Section 6(7) of the Interstate Commerce Act (24 Stat. 380, as amended, 49 U.S.C. 6(1), 6(7)) and of Sections 1 and 3 of the Elkins Act (32 Stat. 847, 848, as amended, 49 U.S.C. 41, 43) are set forth in the Appendix, *infra*, pp. 39–42.

STATEMENT

At the request of the Interstate Commerce Commission, the United States commenced this action seeking an injunction to restrain the Union Pacific Railroad from violating § 6(7) of the Interstate Commerce Act (App. *infra*, pp. 39–40) and § 1 of the Elkins Act (App. *infra*, p. 40). The suit is grounded on

the admitted practice of the Railroad of intentionally delaying in transit, for the convenience of the shipper, the transportation of lumber between Ogden, Utah, and Council Bluffs, Iowa. Based upon the complaint (R. 1–7), answer (R. 7–19), and on cross motions for summary judgment with supporting affidavits and exhibits (R. 19–162), the district court found the facts to be as follows (R. 196–205):

1. ROLLER LUMBER TRAFFIC

In order to produce the vast quantity of lumber required during World War II, numerous new lumber mills commenced operation in the northwest area of the United States. To remain in business when the war demand ended, it was necessary for these mills to develop a method of merchandising adaptable to their operations and the so-called "roller" method of selling lumber resulted. In this type of marketing, a negotiable instrument covering a lumber shipment is turned over to wholesalers or brokers who endeavor to locate a purchaser while the shipment is moving eastward. When a sale is consummated, the transfer to the buyer is accomplished through diversion or reconsignment instructions to the railroad while the shipment is en route (R. 197–198).

Most roller lumber moves to markets east of the Missouri and Mississippi Rivers over lines and routes of railroads which directly serve the northwest area and which, with connecting lines, form numerous through routes to the various markets (R. 198). The Union Pacific has the shortest physical route to these markets and, under normal conditions, is able to deliver lumber in the shortest time (R. 198). Compet-

ing railroads with longer physical routes require a longer time in proportion to the number of miles the shipment must travel to reach its destination (R. 198). The cost of a shipment of lumber to an Eastern market, under published and approved tariff rates, is the same to the shipper whether the lumber is shipped by a direct route or by a long circuitous route (R. 198).

Following World War II, lumber shippers increasingly shipped by the longer circuitous routes in order to gain additional time in which to find a market for lumber which was in transit. For example, a shipment from Portland, Oregon, to Chicago via the Southern Pacific would travel 325 miles more than a shipment via Union Pacific's direct route (R. 198). If the same shipment was originated by Southern Pacific and routed through Tucumcari, New Mexico, and thence to Chicago, it would travel 1,090 miles more than by direct Union Pacific route (R. 198). Since a freight train travels on the average about 300 miles a day (R. 199), a shipper, in the situations illustrated by these examples, would gain from one to four days time in transit by utilizing a route other than Union Pacific's direct route.

2. UNION PACIFIC'S INTENTIONALLY DELAYED SERVICE

To meet the competition of the longer and more time-consuming routes and in order to attract lumber traffic to its lines, the Union Pacific offers to transit wholesalers of lumber a special service whereby it intentionally delays shipments of lumber in transit on its lines in order that the wholesaler may have additional time to find a market for his product (R. 199). As a further part of this special service,

when a sale of the shipment is made and wholesalers by a diversion order request prompt delivery, Union Pacific will remove a "transit car of lumber" from the delayed service and move it forward in regular service to its destination (R. 199). From September 21, 1949, to July 31, 1950, the delay in transit was accomplished by so-called "SMX" ("slow manifest service") schedules for the movement of freight (R. 199–200). "SMX" service between Ogden, Utah, and Council Bluffs, Iowa, was nine days as compared to a normal time of two to four days (R. 200). The delay was effected by setting loaded cars out at various sidings along the main line and restoring the cars to normal service whenever the shipper found a sale (R. 199). The "SMX" service was voluntarily suspended effective July 31, 1950, because of an acute car shortage and in an effort to assist in obtaining greater utilization of the car supply (R. 200).

Between July 31, 1950, and October, 1951, lumber shippers increasingly routed their traffic via longer and slower routes (R. 200). In an effort to regain such traffic, Union Pacific modified its practice by handling roller traffic over a parallel line of its railroad via Ellis, Kansas, 317 miles out of the direct line haul between Ogden and Council Bluffs. Under this procedure, the transit lumber shipper desirous of delayed service had only to place the code words "route via Ellis" on the bill of lading and shipping order (R. 200). This routing required two days over normal schedule when interchanged to connecting carriers at Kansas City, or three days over

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normal schedule when interchanged to connecting carriers at Council Bluffs (R. 200). In the interest of economy, the actual physical handling of traffic via Ellis was discontinued on December 12, 1953, and a so-called "lumber special" service was inaugurated. By this service a lumber shipper continued to use the code words "route via Ellis" and his shipment then proceeded on the Union Pacific main line, but on a schedule comparable to that obtained by a physical movement via Ellis (R. 200–201).

On January 6, 1954, the "lumber special" schedule between Ogden and Council Bluffs was changed to twelve days and on February 15, 1954, it was changed to fourteen days (R. 201). The delay was accomplished by setting lumber cars out on sidings between the point of origin and the point of destination (R. 201). Except for approximately the six month period from June 13 to December 7, 1956, when I.C.C. Service Order No. 910 prohibited the intentional delay of freight shipments while in transit, the Union Pacific continued to operate a 14-day delayed lumber service and "is likely to continue such practices if it is not restrained" (R. 201, 203).[1]

3. THE DECISION OF THE DISTRICT COURT

(a) On April 3, 1959, the district court granted the Government's motion for summary judgment (R. 223) and enjoined (R. 224–225) the Railroad from offering, granting, and giving delayed lumber freight service and from extending to any shipper privileges or facili-

[1] On December 7, 1956, the code words indicating that a shipper desired slow service were changed from "route via Ellis" to "via Colby [Kansas]" (R. 201).

ties of delay unless and until there is a tariff lawfully on file with the Commission naming the rates and charges for such privileges and facilities.[2] The intentionally delayed service, the court found, allows certain lumber shippers a service not provided for by the Railroad's tariff (R. 201). The court also found that by its delayed service Union Pacific contributes the use of its trackage and cars to provide a storage facility for transit lumber shippers and wholesalers, thereby assuming warehousing and inventory maintenance costs of a segment of the lumber industry at no expense to the lumber dealer (R. 201). This service, the court concluded (R. 220), violated § 6(7) of the Interstate Commerce Act prohibiting carriers from extending "to any shipper * * * any privileges or facilities in the transportation of * * * property, except such as are specified" in tariffs filed under § 6(1) of the Act.

In addition, the court found that the delayed lumber service results in added carrier operational problems and costs occasioned by the additional need for power and working crews (R. 202); and that the service entails the payment of excessive per diem costs for the use of foreign cars on the Railroad's line with the resulting tendency to unbalance Union Pacific's annual per diem offsets with other railroads to the economic disfavor of Union Pacific and to the detriment of the national policy to maintain economically stable transportation facilities (R. 202). Finally, the court

[2] The injunction was to become effective on April 23, 1959 (R. 227–228). By subsequent orders the injunction has been stayed pending a final determination of this appeal.

found that the delaying service for lumber is a device whereby transit lumber dealers avoid the payment of demurrage and obtain the advantage of having their lumber on wheels ready for diversion to any potential market and that these advantages place transit lumber dealers in a superior competitive position in the marketing of lumber (R. 202). The court concluded that the delayed lumber service constitutes a device whereby shippers are enabled to transport freight at less than published rates on file with the Commission, and whereby lumber shippers are given advantages, and discriminations are practiced, in favor of such shippers (R. 220). The service, therefore, was held to be a violation of § 1 of the Elkins Act, declaring unlawful the offer, grant or giving of "any rebate, concession or discrimination * * * whereby * * * property shall by any device whatever be transported at a less rate than that named in the tariffs * * * or whereby any other advantage is given or discrimination is practiced."

(b) In October, 1958, six railroad carriers other than Union Pacific filed with the Interstate Commerce Commission tariff schedules setting forth new rules, regulations and practices affecting rates and charges to become effective November 2, 1958 (R. 165). By these schedules, the carriers (R. 169–190) proposed to hold cars loaded with lumber for a period of fifteen days free of demurrage charges at nineteen points in western trunkline territory. On October 27, 1958, the Commission in Investigation and Suspension Docket No. 7050, *Lumber—Free Time Allowance at Hold*

Points, suspended these schedules until June 1, 1959, pending an investigation of their reasonableness (R. 166–167). Although the Union Pacific did not file a similar tariff, on December 15, 1958, in an amendment to its answer in the present case (R. 193), it was urged that the "'lawfulness' of the performance of a slow or delayed service for lumber shippers involves questions within the exclusive primary administrative jurisdiction of the Commission and having asserted that jurisdiction, the Commission has superseded the jurisdiction of this Court and created a situation which renders futile and useless further proceedings * * * and calls for dismissal of the complaint herein" (R. 193–194). In its opinion (R. 205–219), the district court rejected this contention. Noting that the Commission had administratively decided that the delayed lumber service is in violation of § 6(7) of the Interstate Commerce Act and § 1 of the Elkins Act and had requested the Attorney General to institute this proceeding, the court held that § 3 of the Elkins Act placed upon the court the duty of inquiry and decision and empowered the court "upon being satisfied of the truth" (49 U.S.C. 43) to enforce its decision by proper order (R. 210). In enjoining the Railroad from continuing its unlawful service, the court made it clear that it was not passing upon the reasonableness of the 14-day delay in service. "What this Court is holding is that any intentional delay in service offered by defendant must be published in tariff form, so that the Interstate Commerce Commission can

then determine if such delay is reasonable or unreasonable under the circumstances" (R. 219).[3]

SUMMARY OF ARGUMENT

I

A. Appellant's intentionally delayed lumber service, for the shippers' convenience, violates § 6(1) and § 6(7) of the Interstate Commerce Act. Section 6(1) requires that appellant file with the Interstate Commerce Commission, and publish, a tariff which, *inter alia,* must state any "privileges or facilities granted or allowed" by the carrier; § 6(7) prohibits a carrier from extending to "any shipper" privileges or facilities not specified in the carrier's tariffs. Appellant extends to transit lumber dealers a 14-day delayed freight service between Ogden, Utah, and Council Bluffs, Iowa—a distance of 993 miles which, proceeding with "reasonable dispatch," appellant's freight trains ordinarily cover in two to four days. The intentional delay in shipments of lumber is effected for the transit lumber dealer's accommodation—to provide additional time for the dealer to find a buyer for the commodity while in transit. During the intentionally delayed period, the freight car serves as a place of storage and constitutes "a privilege or facility" granted to certain shippers without tariff

[3] On July 31, 1959, a division of the Commission found that the proposed schedules of the carriers involved in Investigation and Suspension Docket No. 7050, were not shown to be just and reasonable and ordered that the schedules be canceled (App., *infra*, pp. 42–53). By order dated December 21, 1959, the Commission granted petitions for reopening the proceeding and reconsideration on the existing record (App., *infra*, pp. 53–54).

specification. The intentionally delayed service is, moreover, a service in excess of a carrier's implied obligation to deliver a shipment within a reasonable time and a deviation from the obligation expressed in the uniform bill of lading to which such shipments are subject. It is immaterial that appellant's delayed service is nominally available to all shippers as § 6(7) prohibits extending the service to any shipper without tariff specification.

B. From the fact that the appellant's intentionally delayed service violates § 6(7) it necessarily follows that the service is violative of § 1 of the Elkins Act which makes unlawful "any rebate, concession, or discrimination" whereby property is transported at less than tariff rates. By its delayed service, appellant assumes warehousing and inventory costs of a segment of the lumber industry; by unnecessarily setting cars on sidings to effect the 14-day delay, appellant incurs the expense attributable to the need for additional power and working crews; in addition, appellant incurs excessive *per diem* costs for the use of foreign cars on its lines. By absorbing these costs and expenses, appellant effects a *pro tanto* reduction in its receipts for the transportation service itself, which amounts to a rebate to the shipper due to "concessions" afforded particular shippers and "discriminations" in favor of shippers in a position to utilize the service. The intentionally delayed service is thus a plain violation of the Act.

The concessions and discriminations inherent in appellant's delayed service result in obvious "advantages" to certain shippers which also make the service

unlawful under § 1 of the Elkins Act. The only reason for the intentionally delayed service is to avoid observance and compliance with appellant's demurrage tariff. In this light, the service is a device to confer an "advantage" upon particular shippers. The advantage is not only pecuniary, but is economic in the sense that a segment of the lumber industry obtains a superior competitive position by appellant gratuitously furnishing a "rolling warehouse."

Decisions of this Court and other courts fully confirm that the district court here correctly concluded that appellant's intentionally delayed service, without tariff provision and for the shipper's convenience, violates both § 6(7) of the Interstate Commerce Act and § 1 of the Elkins Act.

II

A. Appellant's argument that this proceeding, under § 3 of the Elkins Act, presents issues within the primary jurisdiction of the Interstate Commerce Commission is without merit. Section 3, authorizing this proceeding, was enacted to strengthen the enforcement arm of the Commission. This suit for an injunction was commenced at the request of the Commission; under § 3 of the Elkins Act, the district court had the duty to inquire, and, upon being satisfied that the delayed service violates the law, it was obliged to direct its discontinuance. The court has gone no further than the jurisdictional statute provides. The fact that six carriers other than appellant, after the commencement of this suit, filed tariffs whereby they would offer a 15-day delayed lumber service without demurrage charge serves to buttress our position that appellant's service, without tariff provision, is outside

the law. The proceeding now pending in the Commission, to determine the reasonableness and justness of the proposed lumber tariffs filed by other carriers, involves no issue essential or relevant to a final disposition of this suit.

B. Primary jurisdiction concepts have no application here for the further reason that the Commission has already considered the facts relating to appellant's practice and has, in effect, invoked the aid of the court to compel appellant to comply with the applicable statutes and to observe existing tariffs. By taking jurisdiction, the district court actually acts in aid of the primary jurisdiction of the Commission since the injunction here is effective only "unless and until" appellant files with the Commission a tariff providing for an exception to its demurrage tariff or specifying the privileges and facilities it now offers without tariff provision.

C. Independent of the pending proceeding before the Commission, there is no basis for applying the principle of primary jurisdiction to this case. The suit is one to enjoin statutory violations and, in effect, to compel the carrier to observe its existing demurrage tariff. Such suits have always been recognized as being within the judicial province without the need for referral to or of further aid from the Commission. The operative facts of appellant's unlawful practice are admitted and have been previously before the Commission. The expertise or specialized competence of the Commission is in no way essential to a determination of the legality of the practice which is all that the district court has decided. Nor are considerations

of uniformity valid as a predicate for applying the doctrine of primary jurisdiction here. There is no possibility of divergent decisions by various district courts, and an affirming decision by this Court will materially advance the Commission's objective of bringing all carriers within the law and assure equality of treatment for all shippers by all carriers.

ARGUMENT

I. APPELLANT'S INTENTIONALLY DELAYED LUMBER SERVICE, FOR THE CONVENIENCE OF SHIPPERS, VIOLATES THE INTERSTATE COMMERCE ACT AND THE ELKINS ACT

A. BY INTENTIONALLY DELAYING LUMBER SHIPMENTS, APPELLANT EXTENDS TO THE SHIPPER "PRIVILEGES OR FACILITIES" NOT SPECIFIED IN ITS TARIFFS

By § 6(1) of the Interstate Commerce Act (App. *infra,* p. 39) every common carrier is required to file with the Interstate Commerce Commission, and to print and keep open to public inspection, schedules showing all the rates, fares and charges for transportation. The schedules "shall plainly state the places between which property * * * will be carried * * * [and] all privileges or facilities granted or allowed * * *" (49 U.S.C. 6(1)). By § 6(7) of the Act (App. *infra,* pp. 39–40), a carrier is prohibited from extending "to any shipper * * * any privileges or facilities in the transportation of * * * property, except such as are specified in such tariffs" (49 U.S.C. 6(7)). Appellant's intentionally delayed lumber service is within this statutory proscription.

Under normal conditions, appellant's freight trains travel the 993 miles between Ogden, Utah, and Council Bluffs, Iowa (R. 96), in two to four days (R.

199). By the device of a shipper's placing code words—"route via Ellis" (R. 200) or "via Colby" (R. 201)—on the bill of lading and shipping orders, the travel time for this distance is extended by appellant to fourteen days for no other reason than to accommodate the shipper and thereby attract lumber traffic to appellant's line. During the unnecessarily extended transit period, appellant contributes the use of its trackage and cars to provide a warehouse on wheels for transit lumber shippers and wholesalers while they search the markets for buyers for their lumber (R. 201). "To permit a shipper * * * to use freight cars [as a place for storage] is obviously beyond the duties of a carrier",[4] and is an obvious extension to shippers of both "privileges" and "facilities" for which no provision is made in appellant's published tariffs.

Appellant's argument (Br., pp. 46–50), to the effect that its 14-day delayed service between Ogden and Council Bluffs simply reflects an "operating time schedule" slower than the usual two-to-four day service between these points, can hardly be squared with the facts. The record confirms that appellant's delayed service is tailored to fit the economic needs of a particular segment of the lumber industry—the small lumber mills in the northwest. To remain in business at the end of World War II, it was necessary for these mills to develop a method of merchandising adaptable to their operations (R. 197). The "roller"

[4] *Turner, Dennis & Lowry Lumber Co.* v. *Chicago, M. & St. P. Ry. Co.*, 271 U.S. 259, 262; *Chicago & Alton R. Co.* v. *Kirby*, 225 U.S. 155, 164.

method of marketing resulted (R. 197). By this method, "[t]he rolling railroad car is the warehouse" (R. 32, 205); the mill operator "runs his logs through the mill, loads up a car with a favorable mixture, calls the tally to his wholesale outlet and sends them his bill of lading" (R. 31). The appellant then intentionally delays the shipment to afford the lumber wholesaler additional time to find a market for the rolling lumber (R. 2, 8); and, as a further service, when the transit wholesaler (by means of a diversion order) requests prompt delivery of a shipment, the carrier removes the "transit car of lumber" and moves it forward in the regular service toward destination (R. 2, 8; 42–43). Clearly, this type of service is in excess of the carrier's implied obligation "to carry safely and deliver at destination within a reasonable time"[5] and a variation from the terms of § 2(a) of the "Contract Terms and Conditions" of the uniform bill of lading to which appellant's "roller" lumber shipments are subject. Section 2(a) provides that "no carrier is bound to transport * * * property by any particular train * * *, or in time for any particular market or otherwise than with reasonable dispatch" (R. 109).

[5] *Chicago and Alton Railroad Company* v. *Kirby*, 225 U.S. 155, 164; *Davis* v. *Cornwell*, 264 U.S. 560. This Court stated in *Turner Lumber Co.* v. *Chicago, M. & St. P. Ry. Co.*, 271 U.S. 259, 262: "* * * Another cause is diversion of the car from its primary use as an instrument of transportation by employing it as a place of storage, either at destination or at reconsignment points, for a long period while seeking a market for the goods stored therein. To permit a shipper so to use freight cars is obviously beyond the ordinary duties of a carrier. * * *"

The delayed service for the shipper's convenience is a violation of § 6(7) even though appellant makes such service available to all shippers desiring such service (R. 203; cf. R. 35–40). The violation, in terms of § 6(7), is, of course, the extension to shippers of privileges and facilities not specified in appellant's tariffs. Absent the requisite tariff-filing and publication, shippers, insofar as the record discloses, "are familiar with the operation * * * [only] by word of mouth" of appellant's traffic representatives (R. 41). And, to quote further from appellant's general manager (R. 41):

> * * * [V]ery little information pertaining to operation has been released in writing both by the Traffic and this department. * * * it is questionable as to how well it is advertised based on the fact that General Superintendent of Transportation Mahoney, of Santa Fe, just called me day before yesterday, * * * and advised that a representative of a large lumber industry on West Coast had called him on the phone advising him of the handling of this lumber on several other routes including Union Pacific and that unless Santa Fe could likewise handle this traffic they were being cut out of the routing. Mr. Mahoney stated he advised this representative that he could not believe other lines were so handling equipment, especially during the present car situation, and that he would certainly be afraid of ICC taking similar action as previously in the matter.

If, as appears, the General Superintendent of Transportation of a competing carrier was, in July 1954, unaware of appellant's delayed service to transit lum-

ber dealers, the shipping public is probably not in a better position to know that appellant offers, on request or by use of code words on shipping documents, the special service of a 14-day gratuitous delay in transit, whereby the shipper may avoid the demurrage tariffs normally applicable where a freight car is detained by a shipper, consignee, or owner.

A published tariff, conforming to the requirements of § 6(1) of the Act, constitutes notice to all not only of the carrier's rates, but of all "privileges and facilities granted or allowed" by the carrier. And the purpose of requiring a tariff is:

> * * * to secure uniformity of treatment to all, to suppress unjust discriminations and undue preferences, and to prevent special and secret agreements * * * and to that end to require that such rates be established in a manner calculated to give them publicity, to make them inflexible while in force, and to cause them to be unalterable save in the mode prescribed. * * * [*Kansas City So. Ry.* v. *Albers Comm. Co.*, 223 U.S. 573, 597].

It would be an obvious subversion of this Congressional purpose to countenance the giving of special privileges and facilities to shippers because the carrier does not deny the service to any shipper desiring it, and, in extending the service to transit lumber dealers in particular, appellant has not acted selectively or secretly (R. 203). The tariff requirement in § 6(1) is designed to eliminate secret agreements and selective treatment of shippers by the carrier. Implementing § 6(1), § 6(7) prohibits any deviation from established tariffs and prohibits the practice of

extending to shippers "privileges or facilities" not specified in appellant's tariffs.

B. THE DELAYED LUMBER SERVICE IS A DEVICE WHEREBY PROPERTY IS TRANSPORTED AT LESS THAN TARIFF RATES AND IS AN ADVANTAGE GIVEN SHIPPERS USING SUCH SERVICE

1. "[A] preference or rebate is the necessary result of every violation of § 6(7) where the carrier renders or pays for a service not covered by the prescribed tariffs." *United States* v. *Wabash R. Co.*, 321 U.S. 403, 412–413; accord, *United States* v. *U.S. Smelting Co.*, 339 U.S. 186, 194–195; *Davis* v. *Cornwell*, 264 U.S. 560, 562. From the fact that appellant makes available privileges and facilities not provided by tariff (*supra*, pp. 14–19), it follows that the delayed lumber service it renders is also a violation of § 1 of the Elkins Act (App. *infra*, p. 40), declaring unlawful "any rebate, concession, or discrimination in respect to the transportation of any property * * * by any common carrier * * * whereby * * * property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by [the] carrier * * *" (49 U.S.C. 41(1)).

It is admitted that appellant renders a special, delayed service (R. 8–18); it is also admitted that appellant's tariffs do not provide for such service and that no additional charge is exacted of the shipper in a position to take advantage of this service (R. 4, 17). The district court found (and it is not questioned) that, in providing the service, appellant assumes warehousing and inventory maintenance costs of a segment of the lumber industry (R. 201); and that, in unnecessarily setting cars out on sidings to

accomplish the 14-day delay, operational problems arise and costs to the carrier are added, occasioned by the additional need for power and working crews (R. 202). In addition, the delayed service entails the payment of excessive *per diem* costs for the use of foreign cars on appellant's lines to the economic disfavor of appellant (R. 202).[6] Since the additional costs for the delayed lumber service, not specified in appellant's tariff, are assumed by the carrier, there is necessarily a *pro tanto* reduction in appellant's receipts for the transportation service performed. The reduction in receipts here occurs because appellant grants a concession, with the effect of a rebate, to transit lumber shippers and dealers as against shippers who have no need for the special service but must, nevertheless, pay the full tariff rate for transportation.

This court has said, "* * * [A] saving [to a shipper] on the nontransportation services obviously

[6] Excessive per diem costs attributable to the 14-day delayed service were, in July 1954, a source of internal concern to appellant (R. 41):

"In addition to the complications being experienced by the Operating Department, I mention the unfavorable per diem situation. For example, yesterday July 8th there were en route 19 lumber trains on the Eastern District, total of 1,716 cars of which 1,600 were foreign line.

"Based on per diem pay-out of $2.40 per car this amounts to $3,840.00 per day, and based on 14 days schedule requested by Traffic Department Ogden to Council Bluffs the per diem amounts to approximately $53,760.00, there being a slight reduction due to a few cars being diverted and expedited from intermediate terminals. This compares with $26,880.00 when this traffic was moving on previous seven day schedule. For a thirty day period this certainly reflects adversely on Car Hire statement."

figures out the same as a rebate on the transportation service. * * * The [carriers'] loss on in-transit warehousing, entered into to secure the rail-haul, results in lowered receipts for the transportation and in violation of the section [§ 6(7), forbidding the receipt of a less compensation than the tariff]. Some shippers are not in a position to avail themselves of the below-cost in-transit service. They must pay the full transportation rate, without any offset from the warehousing. This discrimination between shippers is unlawful and the remedy applied by the [Commission's] order valid in these circumstances." *Baltimore & Ohio R. Co.* v. *United States,* 305 U.S. 507, 523, 526. See, also, *United States* v. *Union Stock Yard & Transit Co.,* 226 U.S. 286.

2. The concession appellant accords transit lumber shippers, and the discrimination practiced in their favor, also confer upon such shippers, and others in a position to make use of the delayed service, "advantages" prohibited by § 1 of the Elkins Act. The most obvious advantage inuring to the shipper or owner of the shipment by appellant's device of setting cars out on sidings while a shipment is in transit is that the carrier fails "strictly to observe" (49 U.S.C. 41) its demurrage tariff, and the shipper avoids the payment of demurrage charges specified in appellant's demurrage tariff (R. 73–85) which applies "[w]hen cars are held in transit because of any condition solely attributable to consignor, consignee or owner" (R. 79).[7] This tariff authorizes twenty-four hours

[7] See, in particular, Rule 1A (R. 77); Rule 2B, pars. 1 and 4 (R. 79); Rule 3B, pars. 1 and 2 (R. 80); Rule 4B (R. 82); Rule 7A (R. 85).

free time (exclusive of holidays and weekends) when cars are held for reconsignment, diversion, reshipment, or held in transit (at a designated point) on orders of the consignor, consignee or owner (R. 79); after the expiration of the free time allowance, demurrage charges at the rate of $4.00 for the first four days, and $8.00 for each subsequent day, become applicable (R. 85). Thus, a car of transit lumber moving from Ogden to Council Bluffs "with reasonable dispatch" (R.109) ("two to four days" (R. 199)), but not diverted or reconsigned for want of a buyer within twenty-four hours, would thereafter be subject to demurrage charges that, for a ten day delay, would amount to $64.00, computed on the basis of three days in transit and one free day at the point of consignment.

Appellant's intentional delaying of the shipment en route, while the owner looks for a buyer, permits the transit lumber dealer to avoid such charges—an apparent pecuniary advantage, and, *vis a vis* lumber dealers who do business on a firm order basis, gives to the transit dealer a superior competitive position in the marketing of lumber (R. 202). With appellant providing gratuitously a "rolling warehouse," the transit dealer "is always on the current market * * *, his lumber is bringing him a premium price * * * because the buyer is willing to pay more for lumber rolling and only a few days from being at destination, which eliminates the necessity of consumers maintaining large inventories" (R. 31–32).

3. The unlawfulness of appellant's delayed lumber service, in terms of § 1 of the Elkins Act, is as clear

as it is in terms of § 6(7) of the Interstate Commerce Act (*supra*, pp. 14–19). Property is, in effect, transported at less than tariff rates and advantages are given to shippers who know of, and are in a position to take advantage of, the special service; and, by intentionally delaying shipments en route, shippers escape the demurrage charge and appellant avoids observance of and compliance with its own demurrage tariff.

That appellant's practices are violations of the statute is fully confirmed by judicial decisions. In *Baltimore & Ohio R. Co.* v. *United States*, 305 U.S. 507, 526, this Court held that a nontransportation service provided by the railroad—in transit warehousing—at less than compensatory rates, was a violation of § 6(7) forbidding the railroad from receiving less compensation than provided by the transportation tariff. In *Chicago & Alton R. Co.* v. *Kirby*, 225 U.S. 155, the Court held that a carrier's agreement to expedite a shipment was illegal where the carrier's tariff made no provision for the service.

> An advantage accorded by special agreement *which affects the value of the services to the shipper and its cost to the carrier* should be published in the tariffs, and for a breach of such a contract, relief will be denied, because its allowance without such publication is a violation of the [Elkins] Act. It is also illegal because it is an undue advantage in that it is not one open to all others in the same situation. [225 U.S. at 165; emphasis added.] *

* See also, *Davis* v. *Cornwell*, 264 U.S. 560; *Siebert* v. *Erie Railroad Co.*, 189 App. Div. 586, affirmed, 232 N.Y. 517, holding

In *Eastern Shore* v. *New York, P. & N.R. Co.*, 141 Va. 611, 126 S.E. 674, the court held it unlawful, under § 1 of the Elkins Act, for a carrier to delay intentionally the arrival of shipments to give the shipper the advantage of a better market price.[9] Similarly, in *Louisville & N.R. Co.* v. *Warren County Strawberry Growers Association*, 206 Ky. 482, 267 S.W. 551, the court held illegal a carrier's agreement to deliver a commodity within a specified time. The court said (206 Ky. at 485–486):

> * * * [a] carrier contracting to deliver a commodity within a specified time extends to the shipper an advantage and imposes upon itself an obligation not contemplated in the usual method of shipment. If in the tariffs of a carrier on file with the Interstate Commerce Commission there is no provision fixing the schedule of time for delivery of commodities shipped under those tariffs and if for that reason the carrier may contract with whomsoever it chooses to deliver within a specified time and decline to

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unlawful, and not binding on the carrier, an agreement to temporarily leave a car on a siding en route solely for the shipper's accommodation.

[9] *Eastern Shore* v. *New York, P. & N.R. Co.*, 141 Va. 611, 616: "No special rate has been shown to have been published for special contracts to delay shipments, and hence no shipments could legally be delayed.

"If it is unlawful to contract to expedite a shipment, it is unlawful to contract to delay it * * *. These cabbages were not diverted to another market, but the device adopted was one to delay their arrival in the market to which they were originally billed.

"The possibility of discrimination between shippers, to delay one shipper's goods and to forward another's, is as great in this case as it is in case of a special contract to expedite. It is clearly unlawful and custom could not make it lawful."

> so contract with others with whom it may not desire to do so, the entire scheme of prevention of discrimination by carriers devised by the Federal Congress would be rendered of no value. Such shipments with delivery so contracted for would universally be given every service preference at the hands of the carrier. Such preference would be discrimination of the most pernicious character. * * * [To institute such a service] it is indispensably necessary that such be published as a part of the tariffs, and be filed with the Interstate Commerce Commission. Then such service would be open to the shipping public at large on equal terms.

On the basis of these authorities, with the relevant facts pertaining to appellant's intentionally delayed service admitted (R. 7–18), the district court concluded that the delayed service for the convenience of the shipper was a plain violation of both § 6(7) of the Interstate Commerce Act and § 1 of the Elkins Act (R. 219–221). The court's conclusions are undoubtedly correct.[10]

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[10] Though the point is not emphasized in this Court, the district court was clearly correct in rejecting (R. 221) appellant's defense based upon "competitive necessity." The assertion (Br. 8, 11–12, 53; R. 8–15, 199, 200) that appellant is compelled to resort to a delayed lumber service in order to compete with carriers having longer and more circuitous routes (R. 8–15, 199, 200) simply serves to confirm the obvious—that appellant offers, without tariff provision, privileges and facilities, concessions and advantages to particular shippers in order to divert traffic to its lines. Competitive necessity, even in its most exaggerated form, cannot justify practices so obviously in violation of law. *Baltimore & Ohio R. Co.* v. *United States*, 305 U.S. 507, 523; *Chicago, St. P., M. & O. Ry. Co.* v. *United States*, 162 Fed. 835, 839 (C.A. 8), certiorari denied, 212 U.S. 579; *Wisconsin Central Ry. Co.* v. *United*

II. THE DISTRICT COURT DID NOT INVADE THE "PRIMARY JURISDICTION" OF THE INTERSTATE COMMERCE COMMISSION

Appellant's answer to the Government's complaint for an injunction, as originally filed (R. 7–19), admitted the jurisdiction of the district court (R. 8) and did not suggest that the complaint raised fact questions within the primary jurisdiction of the Interstate Commerce Commission. Following appellant's answer, in October, 1958, six carriers, other than appellant, filed with the Commission tariff schedules offering to effect a 15-day delay in the movement of cars of lumber by holding them at various "hold points" without demurrage charges (R. 169–190, 204). On October 27, 1958, the Commission suspended these tariffs and instituted an investigation of the lawfulness of the schedules—"it * * * appearing, [t]hat * * * there is reason to believe that * * * if permitted to become effective, [the schedules] would [result] in rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act * * *" (R. 166).

States, 169 Fed. 76 (C.A. 8); *Turner, Dennis & Lowry Lumber Co.* v. *Chicago, M. & St. P. Ry. Co.*, 2 F. 2d 291, 296 (W.D. Mo.), affirmed, 271 U.S. 259. "We suppose the main reason which in times past moved railroad companies to make rebates or concessions in individual cases was to secure business for their lines, and that the spirit of competition in the race for business brought about the practice of so granting rebates and concessions. This practice, we understand, was the vice aimed at in recent legislation which has for its main object the equalization of rates between given points for the same service * * *". *Chicago, St. P., M. & O. Ry. Co.* v. *United States*, 162 Fed. 835, 839 (C.A. 8), certiorari denied, 212 U.S. 579.

On December 15, 1958, appellant amended its answer in this case (R. 193–194) on the basis of the proceedings pending before the Commission. Appellant urged that the "lawfulness" of a slow or delayed service for lumber shippers involves questions within the exclusive primary jurisdiction of the Commission and that, having asserted that jurisdiction, the Commission has "superseded" the jurisdiction of the district court and has created a situation which "renders futile and useless further proceedings" in this case; appellant therefore called for a dismissal of the Government's complaint (R. 193–194). This argument, rejected by the district court (R. 208–215), is renewed in this Court (Br. pp. 23–46). We submit that the point is without merit.[11]

A. THIS INJUNCTIVE PROCEEDING UNDER § 3 OF THE ELKINS ACT DOES NOT PRESENT ISSUES WITHIN THE PRIMARY JURISDICTION OF THE COMMISSION

1. "* * * The Elkins Act is a part of the federal statutory system for the regulation of interstate carriers of commerce. As with other portions of that system a chief purpose of its enactment was to eliminate rebates, concessions or discriminations from the handling of commerce, to the end that persons and places might carry on their activities on an equal basis. With the adoption of prohibition against open rate-cutting, various devices were resorted to * * *

[11] As previously noted, *supra*, p. 10, n. 3, on July 31, 1959, a division of the Commission found that the proposed schedules of the carriers involved in Investigation and Suspension Docket No. 7050 were not shown to be just and reasonable and ordered that the schedules be cancelled (App., *infra*, pp. 42–53). By order dated December 21, 1959, the Commission granted petitions for reopening the proceeding and reconsideration on the existing record (App., *infra*, pp. 53–54).

[and] concealment of the receipt or payment of rebates was made manifest. Strengthening of the enforcement provisions was sought. This effort finally culminated in the legislative authorization of the injunction as the simplest and most summary legal instrument to destroy discrimination. * * *'' *Union Pacific R. Co.* v. *United States,* 313 U.S. 450, 461.[12] This is such a suit.

As a result of extended investigation, the Commission had "reasonable ground for belief" that appellant and other common carriers were engaging in the carriage of freight at less than published rates and were committing discriminations forbidden by law. 49 U.S.C. 43. At the request of the Commission (R. 210), the United States, on December 23, 1957, commenced this suit (and simultaneously a like proceeding against the Northern Pacific Railway Co.) [13] seeking, as provided by § 3 of the Elkins Act, a discontinuance of the unlawful practice of intentionally delaying lumber shipments solely for the shipper's convenience. With the commencement of this suit, it was "the duty of the court summarily to inquire into the circumstances * * * and upon being satisfied of the truth of the allegations of said petition * * * [t]o enforce an observance of the published tariffs or direct and require a discontinuance of * * * discrimination * * *'' (49 U.S.C. 43). See *Chicago, Ind. & L.*

[12] See, also, *Armour Packing Co.* v. *United States,* 209 U.S. 56, 72; *New York, N.H. & H.R.R. Co.* v. *Interstate Commerce Commission,* 200 U.S. 361, 391.

[13] *United States* v. *Northern Pacific Railway Co.,* Civil No. 3-57-164 (D. Minn.), being held in abeyance pending final disposition of this appeal.

Ry. Co. v. *United States*, 219 U.S. 486, 490–491. The injunction issued in this case (R. 224–225) goes no further than this statutory mandate; in no sense has the district court usurped or invaded the primary jurisdiction of the Commission. *Union Pac. R. Co.* v. *United States*, 313 U.S. 450; *United States* v. *Erie Railroad*, 236 U.S. 259; *Chicago, Ind. & L. Ry. Co.* v. *United States*, 219 U.S. 486, 490–491; *United States* v. *Boston & Maine Railroad*, 157 F. Supp. 218 (D. Mass.); cf. *International Longshoremen's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237, 243–245.

Appellant's argument to the contrary comes as an apparent afterthought prompted by the fact that six other carriers, in apparent recognition of the law's requirements, filed tariffs whereby they, in effect, seek an exemption from existing demurrage tariffs by offering a 15-day delay to lumber shippers without charge—a service appellant now provides without tariff. This fact, however, only demonstrates the anomaly of appellant's position, for the effect of the injunction here is simply to require appellant to observe its demurrage tariff or to file a tariff, specifying the delayed service it now offers certain shippers. Since appellant has filed no tariff providing for its delayed service without charge, the problems here are markedly dissimilar from those involved in Investigation and Suspension Docket No. 7050, *Lumber—Free Time Allowance at Hold Points* (R. 165–166), where the Commission is considering the legality of intentional delay without demurrage charge but *with* tariff provision for the service. The issues in this case are whether appellant, under § 6(7) of the Com-

merce Act, provides "privileges or facilities" to shippers without tariff specification and whether, in doing so, appellant violates § 1 of the Elkins Act. The Commission, on the other hand, is concerned with the reasonableness and justness of tariff schedules filed in accordance with law.[14] The reasonableness or justness of appellant's practice was a matter with which the district court was not concerned and did not even remotely consider (R. 219).

Nothing, then, involved in the pending administrative proceeding is essential or even relevant to the determination of the issues in this suit. In this light, this case is within the rationale of *Crancer* v. *Lowden*, 315 U.S. 631. There, the carrier brought suit to recover certain freight charges; the shipper moved to stay the proceeding pending a determination by the Commission as to the reasonableness of the carrier's freight rate. The issue raised in the trial court was, however, one of classification, a matter upon which the Commission had already passed. The court of appeals sustained the jurisdiction of the trial court. This Court affirmed, saying: "The issue of the reasonableness of the rates was not open to the District Court. The meaning of the tariff had been determined by the Commission. It remained to the railroad only to collect the rates for which the tariff called and for the District Court only to see that the railroad did collect them. * * * Nothing involved in the pending administrative proceedings before the * * *

[14] The fact that a non-transportation service is provided for by tariff, does not, of course, necessarily mean that the service is lawful. *Baltimore & Ohio R. Co.* v. *United States*, 305 U.S. 507.

Commission was essential to the determination of the issue in this suit." 315 U.S. at 635–636.

2. Moreover, "[t]he doctrine of primary jurisdiction * * * is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *United States* v. *Western Pac. R. Co.,* 352 U.S. 59, 63. This suit was brought at the request of the Commission; the administrative agency concerned has, in effect, invoked the aid of the court in the precise manner contemplated by Congress in § 3 of the Elkins Act. In these circumstances, to dismiss the complaint and remand the case to the Commission, as appellant argues should be done (Br. 63), would hardly foster collaboration between court and agency and would be counter to the Congressional intent expressed in § 3 of the Act. Cf. *United States* v. *Ruzicka,* 329 U.S. 287, 294; *United States* v. *Morgan,* 313 U.S. 409, 422. It is the very purpose of § 3 to provide a summary method to enjoin practices not authorized by a filed tariff and to require the carrier to proceed before the Commission, by filing new tariffs, if it wishes to adopt practices not presently authorized in the tariffs. If, as appellant contends, the district court cannot decide whether a practice is one that must be authorized by a tariff or results in a rate less than the filed rate, the object of the section to provide a summary procedure for that purpose would be defeated.

To refer this case to the Commission would, in any event, be an idle formalism. The operative facts relevant to appellant's delaying practices stand admitted (R. 7–18); as to the legality of the practice under the

commerce laws, the Commission's views have already been made abundantly clear by the Commission's act of requesting the Attorney General to institute the proceeding.[15] As the Court aptly said in *United States* v. *Western Pac. R. Co.*, 352 U.S. 59, 69: "Certainly there would be no need to refer the matter of construction to the Commission if that body, in prior releases or opinions, has already construed the particular tariff or clarified the practices underlying it." See, also, *Crancer* v. *Lowden*, 315 U.S. 631.

In summary, by retaining jurisdiction and resolving the legal questions posed by the complaint and appellant's answer, the district court has not usurped or invaded the jurisdiction of the Commission; on the contrary, by enjoining the continuing violations of law, the court has acted in aid of the Commission's jurisdiction. The injunctive order here is effective "unless and until" there is in force with respect to appellant a tariff lawfully on file with the Commission specifying the privileges and facilities presently accorded to some shippers without tariff (R. 225). Thus, by following the lead of the six other carriers who have already filed special lumber tariffs, appellant may obtain from the Commission a determination

[15] This view by the Commission is wholly consistent with prior expressions and decisions by the Commission in which it has repeatedly condemned intentional delays in shipment to suit a shipper's needs. See, *e.g.*, *Chicago, M., St. P. & P.R. Co.* v. *Spokane, P. & S. Ry. Co.*, 300 I.C.C. 453, 487; *Railroad Operating Regulations for the Movement of Loaded Freight Cars*, 298 I.C.C. 371, 375; *Reconsignment Case*, 47 I.C.C. 590, 624; *Export Grain Storage Charges*, 42 I.C.C. 530, 543; *American Paper & Pulp Association* v. *B. & O. R.R. Co.*, 41 I.C.C. 506, 511–513.

of the reasonableness of its practice. Similarly, by filing a tariff, appellant will aid the Commission in "effectuating desirable uniformity and fair competitive relations among all railroads participating in the 'roller' lumber traffic" (App. Br. p. 46). And it is to the Commission, not the court, that appellant should take its plea (Br. pp. 9–11, 53) that the shortest physical route from west to the mid-west, which it has, somehow places it in an inferior competitive position with respect to other carriers. *Supra,* pp. 25–26, n. 10.

B. THERE IS NO BASIS FOR A REFERRAL OF THIS CASE BACK TO THE COMMISSION

We have shown above that the Commission, the administrative agency concerned, has in effect invoked the aid of the court in enforcing existing statutes and in enforcing the published demurrage tariff which has the force and effect of law;[16] that the subsequent administrative proceeding differs materially, both in its nature and in the issues under consideration, from this case; and that the order of the district court is in aid of, not an encroachment upon, the primary jurisdiction of the Commission. Aside from the pending Commission proceeding involving six carriers other than appellant, there is, moreover, no other basis for an application of the doctrine of primary jurisdiction to this case.

1. Since the enactment of the Elkins Act in 1903, the courts have entertained proceedings to enforce the commerce laws and published tariffs without any intimation that the court could not apply the law or

[16] *Penna. R.R. Co.* v. *International Coal Co.*, 230 U.S. 184, 196.

enjoin statutory or tariff violations without a referral to the Commission for preliminary fact determinations.[17] The reasons are apparent from the nature of the proceedings, brought, as they are, at the instance of the regulatory agency, and, presenting, as they do, questions pertaining to the enforcement of tariff provisions and of the commerce laws outlawing in the plainest terms specific conduct by carriers subject to those laws. It must now be taken as settled that such matters are properly decided by the courts whether the proceeding is criminal, civil, or, as this case, in equity, without the need for any reference to, or aid from, the Commission. *Union Pacific R. Co.* v. *United States,* 313 U.S. 450; *United States* v. *Union Stock Yard & Transit Co.,* 226 U.S. 286; *United States* v. *Mich. Portland Cement Co.,* 270 U.S. 521, 522, 524; *United States* v. *Erie Railroad,* 236 U.S. 259; *Chicago, Ind. & L. Ry. Co.* v. *United States,* 219 U.S. 486, 490–491; *United States* v. *Boston & Maine Railroad,* 157 F. Supp. 218 (D. Mass.); see, also, *Crancer* v. *Lowden,* 315 U.S. 631, 635–636; *Yonkers* v. *United States,* 320 U.S. 685, 689; *Texas & Pac. Ry.* v. *Gulf, etc., Ry.,* 270 U.S. 266, 273; *Penna. R.R. Co.* v. *International Coal Co.,* 230 U.S. 184, 196–197; *Mitchell Coal Co.* v. *Penna. R.R. Co.,* 230 U.S. 247, 266; *Turner Lumber Co.* v. *Chicago, M. & St. P. Ry. Co.,* 271 U.S. 259, 262; *Chicago & Alton Ry. Co.* v. *Kirby,* 225 U.S. 155, 164–165; cf. *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426, 447–448; *Great Northern Ry. Co.* v. *Mer-*

[17] Compare *United States Navigation Co.* v. *Cunard S.S. Co.,* 284 U.S. 474; *Far East Conference* v. *United States,* 342 U.S. 570.

chants Elevator Co., 259 U.S. 285, 294; *United States* v. *Western Pac. R. Co.*, 352 U.S. 59.

2. (a) The principle of primary jurisdiction has no place here for the additional reason that the case requires no inquiry, factual or legal, into matters committed exclusively to administrative discretion or to matters requiring specialized administrative competence. *United States* v. *Western Pac. R. Co.*, 352 U.S. 59, 64. The operative facts relative to appellant's delayed lumber service are admitted. The presence of these factors, together with the fact that the Commission itself, through the Attorney General, has invoked the aid of the court, are sufficient to distinguish *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, and *Far East Conference* v. *United States*, 342 U.S. 570, upon which appellant relies.[18] Since the Commission has considered the facts pertaining to appellant's intentionally delayed lumber service and has referred the matter to the Department of Justice for action under § 3 of the Elkins Act, this case closely parallels *Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, where, after administrative consideration, the

[18] Since the Elkins Act was passed to strengthen the enforcement arm of the regulatory agency (*Union Pacific R. Co.* v. *United States*, 313 U.S. 461–462), it cannot validly be argued here that the remedies possibly open to the Commission under the Interstate Commerce Act are exclusive or supersede the judicial remedy provided for in § 3 of the Elkins Act. Compare the statutes involved in *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 480–481; *Far East Conference* v. *United States*, 342 U.S. 570; and see Jaffe, *Primary Jurisdiction Reconsidered*, 102 Pa. L. Rev. 577, 592–595; Convisser, *Primary Jurisdiction: The Rule and its Rationalizations*, 65 Yale L. J. 815.

Court passed upon the lawfulness of the dual-rate system under the Shipping Act of 1916. The district court has done no more than to pass upon the legality of appellant's service in the light of the operative facts which were previously before the Commission as a result of its investigation and which now stand admitted by appellant.

Moreover, the application of the primary jurisdiction doctrine in the *Cunard* and *Far East Conference* cases turned primarily upon "considerations of administrative expertise" (342 U.S. at 576; 284 U.S. at 485). Administrative expertise could well be a pertinent factor if the issues presented related to the reasonableness or justness of appellant's service (49 U.S.C. 1(5)); or, if the issue were whether there was *"unjust* discrimination" (49 U.S.C. 2) or *"undue* or *unreasonable* preference or *advantage"* (49 U.S.C. 3(1)) in the practice of intentionally delaying shipments for the shipper's accommodation.[19] In spite of the appellant's argument (Br. pp. 24–25), these are not the issues presented to or decided by the district court. The Elkins Act outlaws *any* rebate, concession, discrimina-

[19] *Northern Pacific Ry Co.* v. *Solum*, 247 U. S. 477, involved a suit for refund by a shipper and presented a question of reasonableness. The case has no application here. Similarly, *Boston & Maine Railroad* v. *United States*, 358 U.S. 68, is plainly inapposite. The suit originated in the Commission in a carrier's proceeding for a declaration that various *per diems* "were just and reasonable" (358 U.S. at 71). On a review of the Commission's order, the district court remanded the case to the Commission for further consideration. In this Court, the Commission indicated a readiness to "proceed in accordance with the terms of the remand", whereupon the Court held the appeal to be premature and it was accordingly dismissed.

tion or advantage given or practiced by a common carrier (49 U.S.C. 41(1)) and provides for a summary judicial proceeding to compel a discontinuance of the violations (49 U.S.C. 43). Whether appellant's delayed service, without tariff specification, is within this broad proscription presents legal questions that are cognizable by the courts even though, in a proper administrative proceeding (such as that now before it), it is for the Commission to determine the broader, more complex, questions of whether, with tariff specification, a particular service is reasonable and just in the light of all the circumstances, or unduly preferential or discriminatory. Until appellant specifies its service in tariff form, it cannot properly urge that it requires "administrative expertise" or "competence" to resolve that it is now operating outside the law. See the cases cited *supra,* pp. 34–35.

(b) Neither do considerations of uniformity provide a basis for applying to this case the principle of primary jurisdiction. One of the purposes of this suit, the pending action against the Northern Pacific Railway (*supra,* p. 28, n. 13), and contemplated similar suits against other carriers who may be engaging in intentional and unnecessary delays in transit, is to compel the uniform application of demurrage tariffs and an equal, non-discriminatory treatment of all shippers by all carriers. For the courts to entertain these suits involves no risk that a lack of uniformity will result. Cf. *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426. The avenue of the direct appeal to this Court obviates the possibility of divergent opinions by the district courts (cf. App. Br., pp. 17–

18). And, just as an affirming decision by this Court will assure judicial uniformity, it will also materially advance the Commission's objective of bringing all carriers within the law.[20]

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the district court should be affirmed.

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MARCH 1960.

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[20] "The suppression of abuses resulting from violations of § 6(7) would be rendered practically impossible if the Commission were required to suppress all simultaneously or none. Section 12(1) imposes on the Commission the duty to enforce the provisions of the Act. That duty under § 6(7) would hardly be performed if the Commission were to decline to enforce it against one because it could not at the same time enforce it against all." *United States* v. *Wabash R. Co.*, 321 U.S. 403, 414.

APPENDIX

Section 6 of the Interstate Commerce Act (24 Stat. 380, as amended, 49 U.S.C. 6) provides in part:

> SEC. 6. (1) Every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation * * *. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. * * *.
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> * * * * * *
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> (7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges

which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

* * * * *

Sections 1 and 3 of the Elkins Act (32 Stat. 847, 848, as amended, 49 U.S.C. 41, 43) provide in part:

SEC. 1. * * * The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor * * *; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. * * *

* * * * *

SEC. 3. Whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the district court of the United States sitting in equity having

jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several United States attorneys, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by sections 41, 42, or 43 of this title shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by chapter 1 of this title. And in proceedings under said sections and chapter 1 of this title the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giv-

ing such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding: *Provided,* That the provisions of sections 44 and 45 of this title shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission.

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 7050

LUMBER—FREE TIME ALLOWANCE AT HOLD POINTS

Decided July 31, 1959

Proposed schedules providing 15 days of holding time free of demurrage charges for cars of lumber in transit stopped at certain points in western trunkline territory, and one free diversion, found not shown to be just and reasonable. Schedules ordered canceled, and proceeding discontinued.

Charles H. Clay, L. S. Hamilton, W. M. Kirkpatrick, R. R. Merrill, Don McDevitt, Warren H. Ploeger, Elden A. Thorp, and *Edgar Vanneman, Jr.,* for respondents.

William B. Adams, W. C. Cole, H. F. Easterling, Hugh A. Gillis, Frank Loughren, G. H. Shafer, and *E. C. Schmitt* for protestants.

Daniel M. O'Donoghue for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

Report of the Commission

Division 2, Commissioners Winchell, Hutchinson and McPherson

By Division 2:

Due and timely execution of our functions under section 15(7) of the Interstate Commerce Act imperatively requires that no proposed report be issued in this proceeding. Requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By schedules filed to become effective on November 2, 1958, and later, seven rail respondents [1] proposed to hold cars loaded with lumber for a period of 15 days free of demurrage charges at 19 points in western trunkline territory. In addition, three of these respondents proposed one free diversion en route for such shipments. The Chicago, Burlington & Quincy Railroad Company proposed to grant one free diversion only. This respondent, the Illinois Central, and the Minneapolis & St. Louis entered no appearance at the hearing. Upon protest of the Western Pine Association, the Southern Pine Association, and the Georgia-Pacific Corporation, the proposed schedules were suspended until June 2, 1959, when they became effective. These protestants, the Douglas Fir Plywood Association, the Forest Products Division of the Olin Mathieson Chemical Corporation, the Bureau of Inquiry and Compliance of this Commission, and 14 firm-order lumber companies located in mountain-

[1] Chicago and North Western Railway Company; Chicago, Rock Island & Pacific Railroad Company; Chicago, Milwaukee, St. Paul & Pacific Railroad Company (called the Milwaukee); Denver & Rio Grande Western Railroad Company; Illinois Central Railroad Company; Minneapolis & St. Louis Railway Company; and Minneapolis, St. Paul & Sault Ste. Marie Railroad Company (called the Soo line).

Pacific territory presented evidence in opposition to the proposed schedules.

Respondent Chicago and North Western Railway Company moves that we reverse five rulings of the hearing examiner on the admissibility of certain evidence. The testimony of a lumber wholesaler, offered on behalf of certain other wholesalers, was excluded because he lacked personal knowledge of their operations. The witness was permitted to testify to facts within his own knowledge concerning such operations. Secondly, a witness' interpretation of certain language in letters, prepared by firms supporting respondents, authorizing him to testify on their behalf as to their mutual interest in maintaining the present routing practices, was excluded. The language was clear. If an interpretation were necessary, the proper parties to give such would be the firms which prepared the letters. Thirdly, the examiner permitted counsel for one of the protestants to state on the last day of the hearing that, if they were to appear, the testimony of certain lumber mill owners would be similar to that of the witnesses which had already testified. The statement should not have been admitted and will not be considered in the disposition of this proceeding. Fourthly, at the request of the Bureau of Inquiry and Compliance, the examiner took official notice of Service Order No. 910, *Regulations for the Movement of Loaded Freight Cars*, 298 I.C.C. 371. The Chicago & North Western urges that this violates the provisions of rules 1.80 and 1.81 of our General Rules of Practice. Neither of these rules concerns the matter of official notice of this Commission's reports and orders. Finally, the examiner admitted certain evidence presented by the Bureau intended to show "what the existing service is." The evidence concerns certain practices of the railroads

prior to 1958. The Chicago & North Western urges that this evidence is irrelevant since it does not concern the recent practices of the respondents nor the proposed schedules. In an investigation and suspension proceeding, we are not restricted to a narrow consideration of the proposed tariff rules. See *Ayrshire Corp.* v. *United States,* 335 U.S. 573. The evidence also supports other witnesses who testified that the same practices were continued up to the present time. Except to the extent indicated, the motion is overruled.

Effective July 12, 1958, certain Canadian railroads published tariffs providing for 15 days' free time for cars of lumber held at Moose Jaw, Saskatchewan or Winnipeg, Manitoba. To remain competitive and for other reasons, each of the respondents by independent action published the proposed schedules, all of which are subject to expiration dates. The proposed schedules of the Soo Line provide that only one stop for 15 days of free time will be allowed in the United States, and do not provide this service whenever it is provided by other respondents prior to arrival of a car on its line. The proposed schedules of the other respondents have no such restriction, and thus a series of 15-day free-time periods would be available depending on the routing of a given car. Some of the respondents state that they are willing to restrict their schedules to only one 15-day free period for each carload of lumber.

Several "in-transit" lumber dealers appeared in support of the respondents. These dealers are jobbers or brokers who ship lumber before they have a buyer for it. They buy their lumber, generally called green dimension lumber, mostly from small saw mill operators in mountain-Pacific territory and Canada.[2]

[2] Most of these dealers have their headquarters in mountain-Pacific territory, but some are in the South or New England.

Neither the dealers nor the saw mill operators have warehouses, so after the lumber is milled, it is loaded immediately into rail cars for shipment. Normally, it is moved in boxcars in shipments weighing from 40,000 to 50,000 pounds. While the cars are in transit the dealers mail out lists of these cars, describing their contents, to prospective buyers. This type of marketing takes time, and thus these dealers would like to have their cars held at certain points on the lines of the respondents for 15 days before the demurrage charges begin to accrue. After a carload of lumber is sold, it is then reconsigned by the dealer to the buyer by fast rail service. Thus, in-transit marketing[3] needs two services of value, namely, slow service to the hold point or points, and fast service beyond.

At present, the respondents provide the slow service by two methods. By the first, the shipper may request the carriers to delay his cars for several days along the direct route to the hold point.[4] Some of the respondents recognize that this method violates section 6(7) of the Interstate Commerce Act and section 1 of the Elkins Act, because no provision therefor is made in their tariffs and there is no charge for the service. In *United States* v. *Union Pacific Railroad,* 173 F. Supp. 397, decided April 3, 1959, the United States District Court for the Southern District of Iowa said:

> This Court wants it to be clearly understood that it is not hereby holding that the 14-day delay in service now being practiced by the defendant is unreasonable. What this Court is holding is that any intentional delay in the service offered by the defendant must be published in tariff form so that the Interstate

[3] In-transit marketing should not be confused with the transit privileges on lumber which the railroads publish in their tariffs.

[4] The Soo Line has never offered this service.

Commerce Commission can then determine if such delay is reasonable or unreasonable under the circumstance.

By the second method, the shipper may consign his lumber over circuitous routes to the hold points, as provided in the respondents' tariffs. There is evidence that in-transit shippers have gained a delay of more than 15 days by routing the traffic over circuitous routes. However, this method has certain disadvantages. The shipper does not know the location of the car as it moves over the circuitous route, which in many instances embraces the lines of several connecting carriers. When the shipper finds a buyer, each carrier must be contacted until one of them locates the car, which is then reconsigned or diverted to the buyer. The proposed schedules have the advantage of permitting the in-transit dealers to route their cars over a direct route to the hold point, where the cars would be more readily available once a buyer is found.

The protestants introduced the in-transit lists of 18 lumber dealers, none of whom appeared at the hearing. The lists were dated from January 2 to 8, 1959, and offered for sale a total of 630 carloads of lumber, 44 of which originated in Canada. Some of the cars had been under load over 35 days at the time the lists were mailed out. The in-transit dealers who appeared at the hearing stated that they employ similar lists, but none was offered in evidence. One of these dealers sells about 7,000 carloads a year, 90 percent of which is in-transit lumber. He has had as many as 330 cars rolling at one time. A group of 9 of these dealers sells about 10,000 carloads each year, 85 percent of which is in-transit lumber.

The firm-order lumber dealers who oppose these schedules are large wholesalers located in mountain-

Pacific, southern, and southwestern territories. They sell their lumber, generally called kiln-dried lumber which competes with green dimension lumber in many markets, and mill it to the buyer's specifications before shipment. They have adequate warehouse facilities and storage yards for their lumber. These dealers oppose the proposed schedules because they, in effect, provide the in-transit dealers with 15 days of free warehousing. The respondents emphasize that the in-transit dealers are and have been receiving free warehousing for many years by routing their traffic over circuitous routes. However, there is no indication that the bulk of this traffic is or has been moving over such routes. The firm-order dealers contend that circuitous routing of in-transit lumber contributes to a boxcar shortage, and for this reason they are opposed to allowing any shipper 15 days of free time.

The present free time of 24 hours has been in effect for many years, and it applies generally on all traffic. After this free time expires, demurrage charges are applied. The respondents point out that their present demurrage tariffs provide exceptions on certain kinds of traffic, but the reasons for such exceptions are not present here.

The proposed schedules would save the in-transit dealers a maximum of $96 demurrage ($4 per day for the first four days after the free time, and $8 per day thereafter). However, the respondents must pay per diem for "foreign" cars used by them at the rate of $2.75 per day, or $38.50 for 14 days. Thus, on foreign cars loaded with lumber now moving over noncircuitous routes in regular service, these schedules would permit the use of such cars for storage purposes up to a maximum of 15 days at one point. For this service the respondents would receive no revenue,

but would incur the above per diem expenses or in the case of their own equipment would be deprived of its use for revenue producing purposes. Whether or not, after deducting such an amount, the through transportation charges on this traffic would be compensatory is not determinable from the record before us.

Most of the lumber originating in mountain-Pacific territory and held at the 19 designated points is destined to official territory. A large volume of lumber also moves from and to those areas by water via the Panama Canal. The vessels require minimum shipments of 500,000 to 750,000 board feet of lumber,[5] and thus a number of in-transit shippers would have to pool their shipments to meet this minimum requirement. Since each shipper normally finds a different buyer along the east coast, this route is impractical for in-transit marketing. From southern and southwestern territories to official territory in 1957, 25 percent of the pine lumber moved by rail and 75 percent by truck. There is no evidence that motor carriers transport any of this transcontinental traffic. In 1947, the volume of American lumber[6] moved by the railroads, including in-transit lumber, totaled 34,414,600 tons, as contrasted with 19,041,300 tons in 1957. There is no evidence of record that any in-transit traffic originating in mountain-Pacific territory was lost to other modes of transportation.

On July 12, 1958, certain Canadian railroads also published tariffs permitting one free diversion of lumber held at Moose Jaw and Winnipeg. To remain competitive, four of the respondents are here

[5] The weight of one of these cargoes varies with the type of lumber. As an example, 500,000 board feet of green surfaced douglas fir weighs about 650 net tons.

[6] This includes lath and shingles.

proposing a like provision for points on their routes, but little evidence was presented in support thereof. Neither the respondents' witness nor the supporting shipper knew specifically what the present charge was for one diversion of a shipment of lumber. The respondents point out that their tariffs allow three free diversions for shipments of fruits and vegetables, but no evidence was offered to show that the transportation needs in this respect are the same as those of fruits and vegetables.

The respondents urge that 15 days' free time for this traffic is necessary to meet the competition of the Canadian railroads, as well as the delayed or circuitous routing of this traffic. They also state that the proposal suits the commercial needs of the in-transit dealers and small saw mill operators, who, it is feared, will go out of business if the schedules are not approved. However, one of the in-transit dealers testified that, even if the schedules are not approved, western lumber will continue to be marketed by the in-transit system.

With regard to the competition from Canadian carriers, no evidence has been submitted that in-transit lumber originating in the United States has been routed through Canada because of the 15 day free time period available for holding lumber at named points in that country. As shown, circuitous routing entails disabilities not encountered when the lumber is moved over a more direct route. Furthermore, the respondents who participate in circuitous routes are not prohibited from restricting their rates so as to apply only over such routes as they consider to be reasonable.

Finally, the respondents urge that in times of car shortages the Commission should exercise its authority to prevent car delays through emergency service

orders suspending the 15 day free time period. In *Increased Demurrage charges, 1956,* 300 I.C.C. 577, the Commission stated that this method was not satisfactory nor a proper substitute for reasonable demurrage rules and charges applicable generally throughout the United States.

Discussion and conclusions.—As the respondents indicate, under the proposed schedules the in-transit dealers would obtain free warehousing from the railroads as they do under the present method of circuitous routing. However, the proposed 15-day period of free time would give these dealers certain advantages which they do not enjoy when the traffic is consigned over circuitous routes. These advantages would unjustly discriminate against competing firm-order dealers.

Demurrage rules and charges are designed primarily to discourage the detention of cars by shippers. *Pennsylvania R. Co.* v. *Kittanning Co.,* 253 U.S. 319, 323. As stated by the Commission in *Increased Demurrage Charges, 1956, supra,* at page 585: "No shipper * * * has an inherent right to detain cars beyond free time and thus prevent their use by other shippers for the transportation of goods in the general public interest." On the record made, we conclude that the proposed schedules would encourage undue detention of cars at a time when there is a shortage of cars on the railroads generally; would provide for service beyond the primary duties of railroads under line-haul rates; would open the door to like demands from shippers of other commodities similarly circumstanced; and would contravene the national transportation policy to promote adequate, economical, and efficient service and foster sound economic conditions in transportation.

The evidence presented by the respondents in support of the one free diversion proposed on this traffic is meager, and is wholly inadequate upon which to rest a finding that the proposal is just and reasonable.

We find that the proposed schedules are not shown to be just and reasonable. An order will be entered requiring their cancellation and discontinuing the proceeding.

COMMISSIONER MCPHERSON did not participate.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D.C., on the 31st day of July, A.D. 1959.

INVESTIGATION AND SUSPENSION DOCKET NO. 7050

LUMBER—FREE TIME ALLOWANCE AT HOLD POINTS

It appearing, That by orders dated October 27, 1958, and later, the Commission entered upon an investigation concerning the lawfulness of the rates, charges, regulations, and practices stated in certain schedules described in said order, and suspended the operation of the schedules to and including June 1, 1959;

It further appearing, That a full investigation of the matters and things involved in this proceeding has been made, and that said division has made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the respondents here'n be, and they are hereby, notified and required to cancel the said schedules on or before September 8, 1959, upon

not less than 1 day's notice to this Commission and to the general public by filing and posting in the manner prescribed by this Commission, and that this proceeding be, and it is hereby, discontinued.

By the Commission, division 2.

[SEAL] HAROLD D. MCCOY,
Secretary.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 21st day of December, A.D., 1959.

INVESTIGATION AND SUSPENSION DOCKET NO. 7050

LUMBER—FREE TIME ALLOWANCE AT HOLD POINTS

Upon consideration of the record in the above-entitled proceeding; petition of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Illinois Central Railroad Company, filed September 1, 1959, for reconsideration of the report and order of Division 2, decided July 31, 1959; petitions of the Chicago and North Western Railway Company and the Rock Island Lines, filed September 3 and September 4, 1959, respectively, for reconsideration of the aforementioned report and order and request for oral argument; and replies thereto by the Bureau of Inquiry and Compliance of this Commission and protestant, Southern Pine Association, filed September 22, 1959, and reply of various other protestant lumber interests, filed September 24, 1959; and for good cause appearing:

It is ordered, That the petitions for reconsideration be, and they are hereby, granted, and that this proceeding be, and it is hereby, reopened for reconsideration on the present record;

It is further ordered, That, in all other respects the petitions, be, and they are hereby, denied for the reason that the matters submitted in support thereof do not present substantial and material grounds to warrant granting the action sought;

And it is further ordered, That the order entered in this proceeding on July 31, 1959, which order, pursuant to section 17(8) of the Interstate Commerce Act, was stayed pending disposition of the petitions, be, and it is hereby, reinstated, and modified so as to postpone the effective date thereof until the further order of the Commission.

By the Commission.

[SEAL] HAROLD D. MCCOY,
Secretary.

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